U.S. Department of Labor

Office of Administrative Law Judges
36 E. 7th St., Suite 2525
Cincinnati, Ohio 45202

(513) 684-3252
(513) 684-6108 (FAX)

Issue Date: 30 August 2007

Case No.: 2006-BLA-05622

In the Matter of:

E.S.,[1]
Claimant

v.

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS,
Respondent

APPEARANCES:

Edmond Collett, Esq.
For the Claimant

Theresa Ball, Esq.
For the Respondent

BEFORE: JOSEPH E. KANE
Administrative Law Judge

DECISION AND ORDER – AWARD OF BENEFITS

This proceeding arises from a claim for benefits under Title IV of the Federal Coal Mine Health and Safety Act of 1969, as amended, 30 U.S.C. § 901, *et seq.* (the "Act"). Benefits are awarded to coal miners who are totally disabled due to pneumoconiosis. Pneumoconiosis, commonly known as black lung, is a chronic dust disease of the lungs arising from coal mine employment. 20 C.F.R. § 718.201(a) (2001).

The Act's implementing regulations are located in Title 20 of the Code of Federal Regulations, and section numbers cited in this Decision exclusively pertain to that Title. References to DX refer to the exhibits of the Director and "Tr." refers to the official transcript of this proceeding.

[1] In any Decision and Order issued by the U.S. Department of Labor in Black Lung cases after August 1, 2006, the claimant is referred to only by initials rather than by full name in the interest of protecting their privacy.

On April 20, 2006, this case was referred to the Office of Administrative Law Judges by the Director, Office of Workers' Compensation Programs, for a hearing. (DX 31). I based the following Findings of Fact and Conclusions of Law upon my analysis of the entire record, arguments of the parties, applicable regulations, statutes, and case law. Although perhaps not specifically mentioned in this Decision, each exhibit and argument of the parties has been carefully reviewed and thoughtfully considered. Although the contents of certain medical evidence may appear inconsistent with the conclusions reached herein, the appraisal of such evidence has been conducted in conformity with the quality standards of the regulations.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Procedural History and Factual Background

E.S. ("Claimant") was born on March 14, 1945, and has a seventh-grade education. (DX 3; Tr. 8-9). He is married to J.D.S. (DX 3; Tr. 8). Claimant also has a disabled child over the age of eighteen. (DX 3). Claimant claims that he worked twenty years in coal mine employment. (DX 3). He left the mines in 1986 due to injuries sustained in a mining accident. (DX 3). Claimant states that he suffers from difficulty breathing, including, shortness of breath upon exertion and trouble sleeping. (DX 3).

Claimant filed his initial claim for benefits on May 6, 1987. (DX 1). This claim was denied by the District Director, Office of Workers' Compensation on August 21, 1987. Claimant did not appeal this decision. Claimant filed his second claim for benefits on January 22, 1994. On September 6, 1996, Administrative Law Judge Campbell issued a decision and order denying benefits, finding that Claimant had failed to establish any of the elements of entitlement. Claimant appealed, and on August 19, 1997, the Benefits Review Board issued a decision and order affirming Judge Campbell's conclusions. No further action was taken on this claim.

Claimant filed the instant claim for benefits on August 15, 2003. (DX 3). The District Director denied Claimant benefits on June 23, 2004. (DX 20). Claimant subsequently filed notice contesting the Director's findings and requesting a formal hearing. (DX 21). On September 21, 2004, the claim was transferred to the Office of Administrative Law Judges. (DX 25). On October 13, 2005, Administrative Law Judge Roketenetz remanded the matter to the District Director for failure to provide Claimant with a complete pulmonary evaluation as required by §725.406(a). (DX 28). The Director requested additional information from Dr. Simpao, and upon receipt, forwarded the matter to the Office of Administrative Law Judges for a formal hearing. (DX 28). This matter was again transferred to the Office of Administrative Law Judges on April 20, 2006 (DX 30), and a hearing was held before the undersigned on January 11, 2007.

Contested Issues

The parties contest the following issues:

1. Claimant's length of coal mine employment;

2. Whether Claimant is totally disabled;

3. Whether Claimant's total disability, if present, is due to pneumoconiosis; and

4. Whether Claimant has established a material change in conditions per 20 C.F.R. § 725.309(c), (d).

(DX 30).

Dependency

The Claimant alleges two dependents for the purposes of benefit augmentation, namely his wife, J.D.S., and his disabled, dependent daughter, P.S. (DX 3). Claimant was formerly married to C.C., but they divorced in May 1985. (DX 3, 10). Claimant reported that he is not under a court order to make support payments, and does not make substantial contributions to C.C. (DX 3). Claimant married J.D.S. on June 26, 1985. (DX 3). They remain married and live together. (DX 3). The documentary evidence includes the couple's marriage certificate. (DX 9). Finally, Claimant stated that his daughter, P.S., who was born on July 30, 1970, is disabled. (DX 3, 11-12). While Respondent does not contest J.D.S.'s or P.S.'s designation as dependents, Claimant testified at the hearing that only J.D.S. was a dependant. (Tr. 8-9). As this testimony is consistent with Judge Campbell's prior decision, I find that only Claimant's wife is a dependent for purposes of benefit augmentation.

Coal Mine Employment

The duration of a miner's coal mine employment is relevant to the applicability of various statutory and regulatory presumptions. Claimant stated on his application that he worked for twenty years in the coal mines, but quit in 1986 due to injuries sustained in an accident. (DX 3). The District Director made a finding of thirteen years in coal mine employment. (DX 20). Judge Campbell, however, found that Claimant established sixteen years of coal mine employment. (DX 1). This finding was affirmed by the Board. (DX 1). Since Claimant has not had any subsequent coal mine employment, and since Respondent has not submitted any additional evidence to contradict Judge Campbell's previous holding, I will not disturb his previous finding as to the issue of length of coal mine employment in this subsequent claim. *See Sellards v. Director, OWCP*, 17 B.L.R. 1-77 (1993). Claimant last worked in the Nation's coal mines in 1986.

Claimant's last employment was in the State of Tennessee; therefore, the law of the Sixth Circuit is controlling.[2] (DX 4).

Responsible Operator

Liability under the Act is assessed against the most recent operator which meets the requirements of §§ 725.494 and 725.495. The Director concluded that this is a Trust Fund case due to the fact that Blue Diamond Mining, Inc., the last coal mine operator to employ Claimant, was authorized to self-insure but has defaulted on its obligations. (DX 20). As Respondent does not dispute this designation, I find that this is a Trust Fund case.

[2] Appellate jurisdiction with a federal circuit court of appeals lies in the circuit where the miner last engaged in coal mine employment, regardless of the location of the responsible operator. *Shupe v. Director, OWCP*, 12 B.L.R. 1-200 (1989)(en banc).

Newly Submitted Medical Evidence

Medical evidence submitted with a claim for benefits under the Act is subject to the requirement that it must be in "substantial compliance" with the applicable regulations' criteria for the development of medical evidence. *See* 20 C.F.R. §§ 718.101 to 718.107. The regulations address the criteria for chest x-rays, pulmonary function tests, physician reports, arterial blood gas studies, autopsies, biopsies, and "other medical evidence." *Id.* "Substantial compliance" with the applicable regulations entitles medical evidence to probative weight as valid evidence.

Secondly, medical evidence must comply with the limitations placed upon the development of medical evidence. 20 C.F.R. § 725.414. The regulations provide that a party is limited to submitting no more than two chest x-rays, two pulmonary function tests, two arterial blood gas studies, one autopsy report, one biopsy report of each biopsy, and two medical reports as affirmative proof of their entitlement to benefits under the Act. §§ 725.414(a)(2)(i), 725.414(a)(3)(i). Any chest x-ray interpretations, pulmonary function test results, arterial blood gas study results, autopsy reports, biopsy reports, and physician opinions that appear in one single medical report must comply individually with the evidentiary limitations. *Id.* In rebuttal to evidence propounded by an opposing party, a claimant may introduce no more than one physician's interpretation of each chest x-ray, pulmonary function test, or arterial blood gas study. §§ 725.414(a)(2)(ii), 725.414(a)(3)(ii). Likewise, the District Director is subject to identical limitations on affirmative and rebuttal evidence. § 725.414(a)(3)(i-iii).

D. X-ray Reports[3]

Exhibit	Date of X-ray	Physician/Qualifications	Interpretation
DX 14	9/18/03	Simpao	1/2 pp
DX 15	9/18/03	Barrett, BCR, B-reader	Negative

D. Pulmonary Function Studies[4]

Exhibit/ Date of exam	Physician	Age/ Height	FEV_1	FVC	MVV	FEV_1/ FVC	Tracings	Comments
DX 14 9/18/03	Simpao	58/68"	2.13	3.19	60	.67	Yes	Good cooperation and effort

[3] A chest x-ray may indicate the presence or absence of pneumoconiosis. 20 C.F.R. § 718.102(a) and (b). It is not utilized to determine whether the miner is totally disabled, unless complicated pneumoconiosis is indicated wherein the miner may be presumed to be totally disabled due to the disease.

[4] The pulmonary function study, also referred to as a ventilatory study or spirometry, indicates the presence or absence of a respiratory or pulmonary impairment. 20 C.F.R. § 718.104(c). The regulations require that this study be conducted three times to assess whether the miner exerted optimal effort among trials, but the Benefits Review Board (the "Board") has held that a ventilatory study which is accompanied by only two tracings is in substantial compliance with the quality standards at § 718.204(c)(1). *Defore v. Alabama By-Products Corp.*, 12 B.L.R. 1-27 (1988). The values from the FEV_1 as well as the MVV or FVC, must be in the record, and the highest values from the trials are used to determine the level of the miner's disability.

D. Blood Gas Studies[5]

Exhibit	Date of Exam	Physician	pCO_2	pO_2	Resting/ Exercise
DX 14	9/18/03	Simpao	42.3	79	R

D. Narrative Medical Evidence

Dr. Valentino Simpao examined Claimant on September 18, 2003 and submitted a report. (DX 14). Dr. Simpao considered the following: symptomatology (sputum, wheezing, dyspnea, cough, chest pain, orthopnea, ankle edema, and paroxysmal nocturnal dyspnea), employment history (twenty years underground coal mine employment), individual history (frequent colds, attacks of wheezing, arthritis, high blood pressure, and connective tissue disease), family history (high blood pressure, heart disease, diabetes, and asthma), smoking history (one-half pack of cigarettes per day for the past twenty-eight years), physical examination (tactile fremitus increased right over left, increased resonance in the upper chest and axillary area, and crepitation), chest x-ray (1/2), PFT (mild restrictive and moderate obstructive airway disease), ABG (normal), and an EKG (essentially normal). Dr. Simpao diagnosed clinical pneumoconiosis based on the x-ray evidence. In addition, he diagnosed a moderate pulmonary impairment. Dr. Simpao opined that both Claimant's clinical pneumoconiosis and his pulmonary impairment were the result of multiple years of coal dust exposure.

Dr. Simpao submitted a supplemental report on December 9, 2005, in which he concluded that Claimant does not have the respiratory capacity to perform his previous coal mine work in a dust-free environment, and that this total disability was due to pneumoconiosis. (DX 28). Dr. Simpao again noted a history of cigarette smoking, the non-qualifying PFT and ABG values, and the physical examination results. Dr. Simpao added that even though the PFT values do not meet the disability standards set in the federal registry, Claimant's moderate pulmonary impairment was sufficient to preclude him from performing the physical demands of his last job. Dr. Simpao also stated that the September 18, 2003 examination revealed objective evidence of legal pneumoconiosis.

Dr. Simpao submitted a second supplemental repot on December 22, 2005, in which he reiterated his conclusions from the December 9, 2005 report. (DX 28). Dr. Simpao added that based on the objective and subjective findings, Claimant suffers from both clinical and legal pneumoconiosis. Despite the smoking history, which Dr. Simpao admitted was an aggravating factor, he opined that Claimant's coal dust exposure was a contributing factor to the totally disabling moderate pulmonary impairment. Dr. Simpao also emphasized the physical examination findings as support for his opinion.

Previously Submitted Medical Evidence

I incorporate by reference, as if fully set forth herein, the medical evidence contained in Judge Campbell's September 6, 1996 decision and order denying benefits. (DX 1). Claimant

[5] Blood gas studies are performed to detect an impairment in the process of alveolar gas exchange. This defect will manifest itself primarily as a fall in arterial oxygen tension either at rest or during exercise. 20 C.F.R. § 718.105(a).

has not disagreed with the factual summaries provided by Judge Campbell, but argues that the newly submitted evidence supports a finding of a material change in condition. Judge Campbell completely and thoroughly summarized the relevant medical evidence of record from the time Claimant filed his initial claim until the decision and order in September 1996. Therefore, I will not disturb the factual descriptions of the original evidence, but will refer to it as necessary to resolve the subsequent claim issue now before me.

Smoking History

Claimant testified that he has smoked cigarettes for approximately twenty years, and continues to smoke at a rate of one pack per day. (Tr. 10). However, he added that over this twenty year period, there were as much as four years when he did not smoke. (Tr. 11). Thus, Claimant has testified to a sixteen pack-year smoking history. Dr. Simpao reported a continuing smoking habit of one-half pack of cigarettes per day from 1975 until the date of the examination in 2003, or fourteen pack-years. I presume that Claimant would not purposely overstate his smoking history, thereby presenting a possible detriment to his own case. Therefore, I find that Claimant has a sixteen pack-year smoking history and he continues to smoke at a rate of one pack per day.

DISCUSSION AND APPLICABLE LAW

Because Claimant filed his application for benefits after March 31, 1980, this claim shall be adjudicated under the regulations at 20 C.F.R. Part 718. Under this part of the regulations, Claimant must establish by a preponderance of the evidence that he has pneumoconiosis, that his pneumoconiosis arose from coal mine employment, that he is totally disabled, and that his total disability is due to pneumoconiosis. 20 C.F.R. § 725.202(d)(2)(i-iv). Failure to establish any of these elements precludes entitlement to benefits. *See Anderson v. Valley Camp of Utah, Inc.*, 12 B.L.R. 1-111, 1-112 (1989).

Subsequent Claim

The provisions of § 725.309 apply to new claims that are filed more than one year after a prior denial. Section 725.309 is intended to provide claimants relief from the ordinary principles of *res judicata*, based on the premise that pneumoconiosis is a progressive and irreversible disease. *See Lukman v. Director, OWCP*, 896 F.2d 1248 (10th Cir. 1990); *Orange v. Island Creek Coal Company*, 786 F.2d 724, 727 (6th Cir. 1986); § 718.201(c) (Dec. 20, 2000). The amended version of § 725.309 dispensed with the material change in conditions language and implemented a new threshold standard for the claimant to meet before the record may be re-viewed *de novo*. Section 725.309(d) provides that:

> If a claimant files a claim under this part more than one year after the effective date of a final order denying a claim previously filed by the claimant under this part, the later claim shall be considered a subsequent claim for benefits. A subsequent claim shall be processed and adjudicated in accordance with the provisions of subparts E and F of this part, except that the claim shall be denied unless the claimant demonstrates that one of the applicable conditions of entitlement (see § 725.202(d) miner. . .) has changed since the date upon which the order denying the prior claim became final. The applicability of

this paragraph may be waived by the operator or fund, as appropriate. The following additional rules shall apply to the adjudication of a subsequent claim:

(1) Any evidence submitted in conjunction with any prior claim shall be made a part of the record in the subsequent claim, provided that it was not excluded in the adjudication of the prior claim.

(2) For purposes of this section, the applicable conditions of entitlement shall be limited to those conditions upon which the prior denial was based. For example, if the claim was denied solely on the basis that the individual was not a miner, the subsequent claim must be denied unless the individual worked as a miner following the prior denial. Similarly, if the claim was denied because the miner did not meet one or more of the eligibility criteria contained in part 718 of the subchapter, the subsequent claim must be denied unless the miner meets at least one of the criteria that he or she did not meet previously.

(3) If the applicable condition(s) of entitlement relate to the miner's physical condition, the subsequent claim may be approved only if new evidence establishes at least one applicable condition of entitlement. . . .

(4) If the claimant demonstrates a change in one of the applicable conditions of entitlement, no findings made in connection with the prior claim, except those based on a party's failure to contest an issue, shall be binding on any party in the adjudication of the subsequent claim. However, any stipulation made by any party in connection with the prior claim shall be binding on that party in the adjudication of the subsequent claim.

Section 725.309(d) (April 1, 2002).

In the previous claim, Judge Campbell determined that Claimant failed to satisfy any of the conditions of entitlement. (DX 1). Consequently, Claimant must establish at least one element of entitlement by a preponderance of the newly submitted evidence. If Claimant is able to show that he has pneumoconiosis or that he is totally disabled from a pulmonary standpoint, he will avoid having his subsequent claim denied on the basis of the prior denial.

Pneumoconiosis and Causation

Section 718.202 provides four means by which pneumoconiosis may be established: chest x-ray, biopsy, or autopsy, presumption under §§ 718.304, 718.305, or 718.306, or if a physician exercising reasoned medical judgment, notwithstanding a negative x-ray, finds that the miner suffers from pneumoconiosis as defined in § 718.201. 20 C.F.R. § 718.202(a). The regulatory provisions at 20 C.F.R. § 718.201 contain a definition of "pneumoconiosis" provided as follows:

(a) For the purposes of the Act, 'pneumoconiosis' means a chronic dust disease of the lung and its sequelae, including respiratory and pulmonary impairments, arising out of coal mine employment. This definition in-

cludes both medical, or 'clinical,' pneumoconiosis and statutory, or 'legal,' pneumoconiosis.

(1) Clinical Pneumoconiosis. 'Clinical pneumoconiosis' consists of those diseases recognized by the medical community as pneumoconiosis, *i.e.*, the conditions characterized by permanent deposition of substantial amounts of particulate matter in the lungs and the fibrotic reaction of the lung tissue to that deposition caused by dust exposure in coal mine employment. This definition includes, but is not limited to, coal workers' pneumoconiosis, anthracosilicosis, anthracosis, anthrosilicosis, massive pulmonary fibrosis, silicosis or silicotuberculosis, arising out of coal mine employment.

(2) Legal Pneumoconiosis. 'Legal pneumoconiosis' includes any chronic lung disease or impairment and its sequelae arising out of coal mine employment. This definition includes, but is not limited to, any chronic restrictive or obstructive pulmonary disease arising out of coal mine employment.

§ 718.201(a).

It is within the Administrative Law Judge's discretion to determine whether a physician's conclusions regarding pneumoconiosis are adequately supported by documentation. *Lucostic v. United States Steel Corp.*, 8 B.L.R. 1-46, 1-47 (1985). "An administrative law judge may properly consider objective data offered as documentation and credit those opinions that are adequately supported by such data over those that are not." *See King v. Consolidation Coal Co.*, 8 B.L.R. 1-262, 1-265 (1985).

A. X-ray Evidence

Under § 718.202(a)(1), a finding of pneumoconiosis may be based upon x-ray evidence. Because pneumoconiosis is a progressive disease, I may properly accord greater weight to the interpretations of the most recent x-rays, especially where a significant amount of time separates the newer from the older x-rays. *Clark v. Karst-Robbins Coal Co.*, 12 B.L.R. 1-149 (1989) (*en banc*); *Casella v. Kaiser Steel Corp.*, 9 B.L.R. 1-131 (1986). As noted above, I also may assign heightened weight to the interpretations by physicians with superior radiological qualifications. *See McMath v. Director, OWCP*, 12 B.L.R. 1-6 (1988); *Clark*, 12 B.L.R. 1-149 (1989).

Dr. Simpao interpreted the September 18, 2003 x-ray as positive for pneumoconiosis. However, Dr. Barrett, a radiologist a B-reader, found the film to be negative. According more weight to the dually credentialed reading by Dr. Barrett, I find that the September 18, 2003 film is negative for pneumoconiosis. Therefore, considering the preponderance of the newly submitted x-ray evidence, I find that pneumoconiosis has not been established under § 781.202(a)(1).

B. Autopsy/Biopsy

Pursuant to § 718.202(a)(2), a claimant may establish the existence of pneumoconiosis by biopsy or autopsy evidence. As no biopsy or autopsy evidence exists in the record, this section is inapplicable in this case.

C. Presumptions

Section 718.202(a)(3) provides that it shall be presumed that the miner is suffering from pneumoconiosis if the presumptions described in §§ 718.304, 718.305, or 718.306 are applicable. Section 718.304 is not applicable in this case because there is no evidence of complicated pneumoconiosis. Section 718.305 does not apply because it pertains only to claims that were filed before January 1, 1982. Finally, § 718.306 is not relevant because it is only applicable to claims of miners who died on or before March 1, 1978.

D. Medical Opinions

Section 718.202(a)(4) provides another way for a claimant to prove that he has pneumoconiosis. Under § 718.202(a)(4), a claimant may establish the existence of the disease if a physician exercising reasoned medical judgment, notwithstanding a negative x-ray, finds that he suffers from pneumoconiosis. Although the x-ray evidence is negative for pneumoconiosis, a physician's reasoned opinion might support the presence of the disease if it is supported by adequate rationale, notwithstanding a positive x-ray interpretation. *See Trumbo v. Reading Anthracite Co.*, 17 B.L.R. 1-85, 1-89 (1993); *Taylor v. Director, OWCP*, 9 B.L.R. 1-22, 1-24 (1986). The weight given to a medical opinion will be in proportion to its well-documented and well-reasoned conclusions.

A "documented" opinion is one that sets forth the clinical findings, observations, facts, and other data on which the physician based the diagnosis. *Fields v. Island Creek Coal Co.*, 10 B.L.R. 1-19 (1987); *Fuller v. Gibraltar Coal Corp.*, 6 B.L.R. 1-1291 (1984). A report may be adequately documented if it is based on items such as a physical examination, symptoms, and patient's history. *See Hoffman v. B & G Construction Co.*, 8 B.L.R. 1-65 (1985); *Hess v. Clinchfield Coal Co.*, 7 B.L.R. 1-295 (1984); *Buffalo v. Director*, OWCP, 6 B.L.R. 1-1164, 1-1166 (1984); *Gomola v. Manor Mining and Contracting Corp*., 2 B.L.R. 1-130 (1979).

A "reasoned" opinion is one in which the underlying documentation and data are adequate to support the physician's conclusions. *See Fields, supra*. The determination that a medical opinion is "reasoned" and "documented" is for this Court to determine. *See Clark v. Karst-Robbins Coal Co.*, 12 B.L.R. 1-149 (1989) (*en banc*).

The only newly submitted medical opinion in the record is that of Dr. Simpao. Based on a positive x-ray, employment and smoking histories, non-qualifying PFT and ABG values, and a physical examination, he opined that Claimant suffers from both clinical and legal pneumoconiosis. Dr. Simpao's clinical pneumoconiosis diagnosis appears to be based entirely on the Claimant's length of coal mine employment and Dr. Simpao's x-ray interpretation. The Sixth Circuit Court of Appeals has held that merely restating an x-ray is not a reasoned medical judgment under § 718.202(a)(4). *Cornett v. Benham Coal, Inc*., 227 F.3d 569 (6th Cir. 2000). The Board has also explained that, when a doctor relies solely on a chest x-ray and coal dust

exposure history, a doctor's failure to explain how the duration of a miner's coal mine employment supports his diagnosis of the presence or absence of pneumoconiosis renders his opinion "merely a reading of an x-ray . . . and not a reasoned medical opinion." *Taylor v. Brown Bodgett, Inc*., 8 B.L.R. 1-405 (1985). See *also Worhach v. Director, OWCP*, 17 B.L.R. 1-105, 1-110 (1993)(citing *Anderson v. Valley Camp of Utah, Inc*., 12 B.L.R. 1-111, 1-113 (1989)(it is permissible to discredit the opinion of a physician which amounts to no more than a restatement of the x-ray reading). As a result, I find that Dr. Simpao's identification of clinical pneumoconiosis unreasoned.

Turning to legal pneumoconiosis, I find Dr. Simpao's initial report failed to diagnose the condition. However, his two supplemental reports explained that the objective evidence he considered supports a finding of legal pneumoconiosis. Dr. Simpao did not provide a clear explanation as to how the non-qualifying PFT and ABG values or the examination results demonstrated the disease. An unsupported medical conclusion is not a reasoned diagnosis. *Fuller v. Gibraltar Corp.*, 6 B.L.R. 1-292 (1984). *See also Phillips v. Director, OWCP*, 768 F.2d (8th Cir. 1985); *Smith v. Eastern Coal Co*., 6 B.L.R. 1-1130 (1984); *Duke v. Director, OWCP*, 6 B.L.R. 1-673 (1983)(a report is properly discredited where the physician does not explain how underlying documentation supports his or her diagnosis); *Waxman v. Pittsburgh & Midway Coal Co.*, 4 B.L.R. 1-601 (1982). While I find that Dr. Simpao's failure to explain how the objective evidence supports his conclusion, due to the fact that the PFT revealed a moderate pulmonary impairment and considering the abnormal observations on physical examination, I do not find that Dr. Simpao's opinion to be without objective support. As a result, I find that Dr. Simpao's opinion is supported by the objective evidence he considered, and thus, it is adequately well-reasoned and documented to support a finding of legal pneumoconiosis. Therefore, I accord his opinion probative weight.

Accordingly, I find that the newly submitted medical opinion evidence supports a finding of legal pneumoconiosis. Therefore, I find that the preponderance of the newly submitted narrative evidence under subsection (a)(4) is positive for legal pneumoconiosis.

I have determined that Claimant has pneumoconiosis by a preponderance of the newly submitted evidence under Section 718.202 (a)(4). In the 1996 decision and order, Judge Campbell considered Dr. Wicker's 1994 examination report, which found the lungs to be normal on examination and produced non-qualifying PFT and ABG values, and a medical records review by Dr. Kraman, which revealed no measurable pulmonary impairment. In addition, the record from Claimant's initial claim included reports by Drs. Baker, Wright, Anderson, and Powell from 1987, none of which reported lung abnormalities on physical examination, and none identified any pulmonary impairment based on the PFT values. Comparing the previously submitted medical reports to the newly submitted evidence, I find that Dr. Simpao's finding of pulmonary abnormality by PFT values and physical examination is qualitatively different from the previously submitted medical evidence. Furthermore, I find that Dr. Simpao's examination, conducted nine years after the next most recent medical report, it the most probative of record. *See Coleman v. Ramey Coal Co*., 18 B.L.R. 1-9 (1993) (more weight may be accorded to the results of a recent ventilatory study over the results of an earlier study); s*ee, also, Bates v. Director, OWCP*, 7 B.L.R. 1-113 (1984) (more recent report of record entitled to more weight than reports dated eight years earlier). Therefore, considering all of the evidence of record, I find that Claimant has shown that he suffers from legal pneumoconiosis, and thus, has demonstrated a material change in condition sufficient to satisfy the requirements of Section 725.309(d). As a

result, Respondent's concession of this element of entitlement is supported by the record, and Claimant's subsequent claim will not be denied on the basis of the prior denial. In order to receive benefits, Claimant must now satisfy the remaining requirements of Section 718, considering both the old and new evidence.

Causation of Pneumoconiosis

Once it is determined that a claimant suffers from pneumoconiosis, it must be determined whether the claimant's pneumoconiosis arose, at least in part, out of coal mine employment. 20 C.F.R. § 718.203(a). The burden is on Claimant to demonstrate by a preponderance of the evidence that his pneumoconiosis arose out of his coal mine employment. 20 C.F.R. § 718.203(b) provides:

> If a miner who is suffering or has suffered from pneumoconiosis was employed for ten years or more in one or more coal mines, there shall be a rebuttable presumption that the pneumoconiosis arouse out of such employment.

Id.

As I have found that Claimant has established sixteen years of coal mine employment, and as no rebuttal evidence was presented, I find that Claimant's pneumoconiosis arose out of his coal mine employment in accordance with the presumption set forth in Section 718.203(b).

Total Disability

The determination of the existence of a totally disabling respiratory or pulmonary impairment shall be made under the provisions of § 718.204. A miner is considered totally disabled when his pulmonary or respiratory condition prevents him from performing his usual coal mine work or comparable work. 20 C.F.R. § 718.204(b)(1). Nonrespiratory and nonpulmonary impairments have no bearing on a finding of total disability. *See Beatty v. Danri Corp.*, 16 B.L.R. 1-11, 1-15 (1991). A claimant can be considered totally disabled if the irrebuttable presumption of § 718.304 applies to his claim. If, as in this case, the irrebuttable presumption does not apply, a miner shall be considered totally disabled if, in absence of contrary probative evidence, the evidence meets one of the § 718.204(b)(2) standards for total disability. The regulation at § 718.204(b)(2) provides the following criteria to be applied in determining total disability: 1) pulmonary function studies; 2) arterial blood gas tests; 3) a cor pulmonale diagnosis; and/or, 4) a well-reasoned and well-documented medical opinion concluding total disability. Under this section, I must first evaluate the evidence under each subsection and then weigh all of the probative evidence together, both like and unlike evidence, to determine whether claimant has established total respiratory disability by a preponderance of the evidence. *Shedlock v. Bethlehem Mines Corp.*, 9 B.L.R. 1-195, 1-198 (1987).

A. Pulmonary Function Tests

Under Section 718.204(b)(2)(i), total disability may be established with qualifying pulmonary function tests.[6] To be qualifying, the $FEV_{1,}$ as well as the MVV or FVC values, must equal or fall below the applicable table values. *Tischler v. Director, OWCP*, 6 B.L.R. 1-1086 (1984). I must determine the reliability of a study based upon its conformity to the applicable quality standards, *Robinette v. Director, OWCP*, 9 B.L.R. 1-154 (1986), and must consider medical opinions of record regarding reliability of a particular study. *Casella v. Kaiser Steel Corp.*, 9 B.L.R. 1-131 (1986). In assessing the reliability of a study, I may accord greater weight to the opinion of a physician who reviewed the tracings. *Street v. Consolidation Coal Co.*, 7 B.L.R. 1-65 (1984). Because tracings are used to determine the reliability of a ventilatory study, a study which is not accompanied by three tracings may be discredited. *Estes v. Director, OWCP*, 7 B.L.R. 1-414 (1984). If a study is accompanied by three tracings, then I may presume that the study conforms unless the party challenging conformance submits a medical opinion in support thereof. *Inman v. Peabody Coal Co.*, 6 B.L.R. 1-1249 (1984). Also, little or no weight may be accorded to a ventilatory study where the miner exhibited poor cooperation or comprehension. *See, e.g., Houchin v. Old Ben Coal Co.*, 6 B.L.R. 1-1141 (1984).

All of the pulmonary function tests of record produced nonqualifying values. Accordingly, I find per Section 718.204(b)(2)(i) that Claimant has failed to establish total disability.

B. Blood Gas Studies

Under Section 718.204(b)(2)(ii), total disability may be established with qualifying arterial blood gas studies. All blood gas study evidence of record must be weighed. *Sturnick v. Consolidation Coal Co.*, 2 B.L.R. 1-972 (1980). This includes testing conducted before and after exercise. *Coen v. Director, OWCP*, 7 B.L.R. 1-30 (1984). In order to render a blood gas study unreliable, the party must submit a medical opinion that a condition suffered by the miner or circumstances surrounding the testing affected the results of the study and, therefore, rendered it unreliable. *Vivian v. Director, OWCP*, 7 B.L.R. 1-360 (1984) (miner suffered from several blood diseases); *Cardwell v. Circle B Coal Co.*, 6 B.L.R. 1-788 (1984) (miner was intoxicated).

All of the arterial blood gas studies produced nonqualifying values. Accordingly, I find that Claimant has not proven total disability under Section 718.204(b)(2)(ii).

C. Cor Pulmonale

There is no medical evidence of cor pulmonale in the record. I find that Claimant failed to establish total disability with medical evidence of cor pulmonale under the provisions of Section 718.204(b)(2)(iii).

[6]A qualifying pulmonary function study or arterial blood gas study yields values that are equal to or less than the applicable table values found in Appendices B and C of Part 718. *See* 20 C.F.R. § 718.204(b)(2)(i) and (ii). A nonqualifying test produces results that exceed the table values.

D. Medical Opinions

The final way to establish a totally disabling respiratory or pulmonary impairment under Section 718.204(b)(2) is with a reasoned medical opinion. The opinion must be based on medically acceptable clinical and laboratory diagnostic techniques. *Id*. A claimant must demonstrate that his respiratory or pulmonary condition prevents him from engaging in his "usual" coal mine employment or comparable and gainful employment. 20 C.F.R. § 718.204(b)(2)(iv).

The weight given to each medical opinion will be in proportion to its documented and well-reasoned conclusions. In assessing total disability under Section 718.204(b)(2)(iv), the Administrative Law Judge, as the fact-finder, is required to compare the exertional requirements of the claimant's usual coal mine employment with a physician's assessment of the claimant's respiratory impairment. *Budash v. Bethlehem Mines Corp.*, 9 B.L.R. 1-48, 1-51 (holding medical report need only describe either severity of impairment or physical effects imposed by the claimant's respiratory impairment sufficiently for the Administrative Law Judge to infer that the claimant is totally disabled). Once it is demonstrated that the miner is unable to perform his or her usual coal mine work, a *prima facie* finding of total disability is made and the party opposing entitlement bears the burden of going forth with evidence to demonstrate that the miner is able to perform comparable and gainful work pursuant to Section 718.204(c)(2). *Taylor v. Evans & Gambrel Co.*, 12 B.L.R. 1-83 (1988).

None of the previous medical opinions of record reported that Claimant was totally disabled. However, based on PFT values, a consideration of the exertional requirements of Claimant's last coal mine employment, and physical examination results, Dr. Simpao opined that Claimant is totally disabled from a pulmonary standpoint. As Dr. Simpao's opinion is based on the objective evidence he considered, I find that his conclusion is adequately well-reasoned and documented to support a finding of total pulmonary disability. Thus, I accord his opinion probative weight. Furthermore, I accord more weight to the evidence submitted since 1995 because I find that it is likely to contain a more accurate evaluation of the miner's current condition. *Bates*, 7 B.L.R. 1-113. Therefore, I find that Dr. Simpao's opinion is the most probative of record, and thus, I find that Claimant has established total disability by the preponderance of the evidence under Section 718.204(b)(2)(iv).

E. Overall Total Disability Finding

I have found that Claimant has failed to establish total disability under subsections (b)(2)(i-iii), but has proven the condition under subsection (b)(2)(iv). Upon consideration of all of the evidence of record, I find that Dr. Simpao's medical opinion, which considered the most recent PFT and ABG values, to be the most probative. Despite the fact that these values were non-qualifying, I find that his determination that Claimant is totally disabled from a pulmonary perspective to be controlling. Therefore, I find that Claimant has proven, by a preponderance of the evidence, that he is totally disabled from performing his previous coal mine employment. Accordingly, I find that Claimant has established total disability under the provisions of Section 718.204(b).

Total Disability Due to Pneumoconiosis

The amended regulations at § 718.204(c) contain the standard for determining whether Miner's total disability was caused by Miner's pneumoconiosis. Section 718.204(c)(1) determines that a miner is totally disabled due to pneumoconiosis if pneumoconiosis, as defined in § 718.201, is a "substantially contributing cause" of the miner's totally disabling respiratory or pulmonary impairment. Pneumoconiosis is a "substantially contributing cause" of the miner's disability if it has a material adverse effect on the miner's respiratory or pulmonary condition or if it materially worsens a totally disabling respiratory or pulmonary impairment which is caused by a disease or exposure unrelated to coal mine employment. §§ 718.204(c)(1)(i) and (ii). Section 718.204(c)(2) states that, except as provided in § 718.305 and § 718.204(b)(2)(iii), proof that the miner suffered from a totally disabling respiratory or pulmonary impairment as defined by §§ 718.204(b)(2)(i), (ii), (iv), and (d) shall not, by itself, be sufficient to establish that the miner's impairment was due to pneumoconiosis.

Except as provided by Section 718.204(d), the cause or causes of a miner's total disability shall be established by means of a physician's documented and reasoned medical report. 20 C.F.R. § 718.204(c)(2). The Sixth Circuit Court of Appeals has stated that pneumoconiosis must be more than a "de minimus or infinitesimal contribution" to the miner's total disability. *Peabody Coal Co. v. Smith,* 12 F. 3d 504, 506-507 (6th Cir. 1997). The Sixth Circuit has also held that a claimant must affirmatively establish only that his totally disabling respiratory impairment (as found under § 718.204) was due - at least in part – to his pneumoconiosis. *Cf.* 20 C.F.R. 718.203(a); *Adams v. Director, OWCP*, 886 F.2d 818, 825 (6th Cir. 1988); *Cross Mountain Coal Co. v. Ward*, 93 F.3d 211, 218 (6th Cir. 1996)(opinion that miner's impairment is due to his combined dust exposure, coal workers pneumoconiosis as well as his cigarette smoking history is sufficient). More recently, in interpreting the amended provision at § 718.204(c), the Sixth Circuit determined that entitlement is not precluded by "the mere fact that a non-coal dust related respiratory disease would have left the miner totally disabled even without exposure to coal dust." *Tennessee Consolidated Coal Co. v. Director, OWCP [Kirk}*, 264 F.3d 602 (6th Cir. 2001). A miner "may nonetheless possess a compensable injury if his pneumoconiosis materially worsens this condition." *Id*.

As stated above, I accord more weight to the evidence submitted since 1995 due to its recency and the progressive nature of pneumoconiosis. Furthermore, since Drs. Baker, Wright, Anderson, Wickers, Kramen, and Powell did not find Claimant to be totally disabled, I find that their opinions are not relevant to the discussion under Section 718.204(c). Next, since I have found that Claimant suffers from legal pneumoconiosis, I will accord the opinions of those physician who diagnosed legal pneumoconiosis and total disability more weight in assessing the reliability of their opinion. *See, e.g. Hobbs v. Clinchfield Coal Co.*, 45 F.3d 819 (4th Cir. 1995); *Toler v. Eastern Assoc. Coal Co.*, 43 F.3d 109 (4th Cir. 1995). Therefore, since only Dr. Simpao diagnosed legal pneumoconiosis and total pulmonary disability, I find that his opinion is the most probative as to the etiology of Claimant's respiratory impairment. Thus, since Dr. Simpao concluded that this impairment was caused by pneumoconiosis, I find that Claimant proven total disability due to pneumoconiosis under Section 718.204(c).

ENTITLEMENT

The Claimant has established a material change in conditions sufficient to meet the statutory requirements of Section 725.309(d) because he has proven, through the newly submitted evidence, that he suffers from pneumoconiosis arising out of coal mine employment. In addition, as Claimant has also proven that he is totally disabled due to pneumoconiosis, I find that he is entitled to benefits under the Act.

I cannot determine the month of onset of Claimant's total disability due to pneumoconiosis arising out of coal mine employment. Thus, benefits are payable beginning with the month in which he filed his application for benefits. *See* 20 C.F.R. § 725.503(b). Claimant filed his subsequent claim for benefits in August 2003. Therefore, I find that benefits are payable beginning in August 2003.

Attorney's Fees

No award of attorney's fees for services to Claimant is made herein, as no application has been received from counsel. A period of thirty (30) days is hereby allowed for Claimant's counsel to submit an application, with a service sheet showing that service has been made upon all parties, including Claimant. The Parties have ten (10) days following receipt of any such application within which to file their objections. The Act prohibits the charging of any fee in the absence of such approval. *See,* 20 C.F.R. §§ 725.365 and 725.366.

ORDER

IT IS ORDERED that the claim of E.S. for benefits under the Act is hereby GRANTED.

A

JOSEPH E. KANE
Administrative Law Judge

Notice of Appeal Rights:

If you are dissatisfied with the Administrative Law Judge's Decision, you may file an appeal with the Benefits Review Board ("Board"). To be timely, your appeal must be filed with Board within thirty (30) days from the date of which the Administrative Law Judge's Decision is filed with the District Director's office. *See* 20 C.F.R. §§ 725.458 and 725.459. The address of the Board is: Benefits Review Board, U.S. Department of Labor, P.O. Box 37601, Washington, D.C., 20013-7601. Your appeal is considered filed on the date it is received in the Office of the Clerk of the Board, unless the appeal is sent by mail and the Board determines that the U.S. Postal Service postmark, or other reliable evidence establishing the mailing date, may be used. *See* C.F.R § 802.207. Once an appeal is filed, all inquiries and correspondence should be directed to the Board.

After receipt of an appeal, the Board will issue a notice to all parties acknowledging receipt of the appeal and advising them as to any further action needed.

At the time you file an appeal with the Board, you must also send copy of the appeal letter to Allen Feldman, Associate Solicitor, Black Lung and Longshore Legal Services, U.S. Department of Labor, 200 Constitution Ave., NW, Room N-2117, Washington, D.C., 20210. *See* 20 C.F.R. § 725.481.

If an appeal is not timely filed with the Board, the Administrative Law Judge's Decision becomes the final order of the Secretary of Labor pursuant to 20 C.F.R. § 725.479(a).